

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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7 In the Matter of:

8  
9 SEARS HOLDINGS CORPORATION,

10  
11 Debtors.

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13 - - - - -x

14 Vir VENTURES, ET AL.,

15  
16 Plaintiffs,

17 VS.

Adv. No. 19-08700-RDD

18 SEARS HOLDINGS CORPORATION,

19 Defendant.

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21 - - - - -x

22 United States Bankruptcy Court

23 300 Quarropas Street, Room 248

24 White Plains, New York

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February 24, 2020

10:16 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

1 Notice of Agenda of Matters Scheduled for Hearing on  
2 February 24, 2020 at 10:00 a.m.

3  
4 HEARING RE: Adversary proceeding: 19-08700-rdd, Vir  
5 Ventures, Inc., et al v Sears Holdings Corporation, Pre-  
6 trial Conference.

7  
8 HEARING RE: Adversary proceeding: 19-08700-rdd, Vir  
9 Ventures, Inc., et al v Sears Holdings Corporation, Motion  
10 to Adjourn Adversary Proceeding or for an Extension of Time  
11 to Answer or Otherwise Respond to Plaintiffs' Adversary  
12 Complaint (related Document(s) 5).

13  
14 HEARING RE: Administrative Claims Consent Program.

15  
16 HEARING RE: Motion to Allow Relief from Amended Stipulated  
17 Protective Order filed by Sonia E. Colon on behalf of Santa  
18 Rosa Mall, LLC (ECF 7210).

19  
20 HEARING RE: Motion to Approve/Second Motion for Orders  
21 Establishing Streamlined Procedures Governing Adversary  
22 Proceedings Brought by the Debtors Pursuant to Sections 502,  
23 547, 548 and 550 of the Bankruptcy Code (ECF 7204).

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1 HEARING RE: Motion to Authorize/Motion of Debtors Requesting  
2 Release of Adequate Assurance Deposit Amounts Pursuant to  
3 the Adequate Assurance Procedures (ECF 7290) .  
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24 Transcribed by: Pamela Skaw, Nicole Yawn and  
25 Jamie Gallagher

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8  
9 ALSO PRESENT:

10 SELEN MAZER PAYMER (ph)

11 NEVILLE N. REED, ESQ. (TELEPHONIC)

12 LUCAS SCHNEIDER, ESQ. (TELEPHONIC)

13 SHARON C. BRITTON, ESQ. (TELEPHONIC)

14 LIGEE GU, ESQ. (TELEPHONIC)

15 DALE MENENDEZ, ESQ. (TELEPHONIC)

16 CARLOS RIOS GAUTIER, ESQ. (TELEPHONIC)

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Please be seated. Okay. Good morning.

4 In re Sears Holdings Corporation, et al.

5 MS. CROZIER: Good morning, Your Honor.

6 The first item on the agenda is the initial pre-  
7 trial conference in Vir Ventures, et al. against Sears  
8 Holdings Corporation, number 19-08700.

9 THE COURT: Okay.

10 MS. CROZIER: Jennifer --

11 THE COURT: And related to that is Sears Holdings  
12 Corporation's motion to adjourn or alternative for an  
13 extension of time to answer.

14 So why don't we take both of those matters  
15 together?

16 MS. CROZIER: Thank you, Your Honor.

17 Jennifer Crozier, Weil Gotshal & Manges for the  
18 Debtors.

19 Your Honor, the Debtors move to adjourn or stay  
20 this adversary proceeding or, in the alternative, for an  
21 extension of time to respond to Plaintiffs' complaint.

22 The Plaintiffs are litigating their administrative  
23 expense claims in three separate contexts forcing the  
24 Debtors to contend against those claims on three separate  
25 fronts and expend the limited resources of the estate in so

1 doing to the detriment of the estate's other creditors.

2 The Plaintiffs, on November 12, 2019, filed their  
3 adversary complaint asserting several claims based, in  
4 pertinent part, on allegations that the Debtors breached  
5 certain Sears' market place agreement.

6 The complaint seeks \$790,000 approximately with  
7 respect to pre-petition amounts and \$95,000 approximately  
8 with respect to post-petition amounts.

9 Now, before they filed their adversary complaint,  
10 Plaintiffs filed six proofs of claim. In August 2019, the  
11 Debtors objected to these claims seeking to reclassify those  
12 general unsecured claims.

13 THE COURT: Because they were filed as 503(b)(9)?

14 MS. CROZIER: Correct.

15 THE COURT: Claims.

16 MS. CROZIER: The Plaintiffs responded and those  
17 claims are now the subject of a pending contested matter.

18 And then six days after they filed their adversary  
19 complaint, Plaintiffs affirmatively opted in to the  
20 administrative expense claims consent program by submitting  
21 two opt-in ballots; the first on behalf of Plaintiff AMI for  
22 approximately \$700,000. That covered both pre and post-  
23 petition amounts. And the second Plaintiff, Vir Ventures,  
24 for approximately \$185,000; again covering both pre and  
25 post-petition amounts.



1           So, Your Honor, the Debtors ask this Court to  
2           adjourn this proceeding until Plaintiffs' administrative  
3           expense claims have been resolved in connection with the  
4           pending contested matter and the administrative expense  
5           claims consent program. These are the contexts approved by  
6           this Court in the confirmation order and the omnibus  
7           objection procedures for the orderly and efficient  
8           resolution of claimants' administrative expense claims.

9           This adversary proceeding is decidedly not the  
10          proper context in which to litigate Plaintiffs'  
11          administrative expense claims.

12          First, the pre-petition amounts the Plaintiffs are  
13          seeking amount to a claim for money damages based on pre-  
14          petition conduct which is not properly brought as an  
15          adversary proceeding under the law and that's In Re Ephedra  
16          Products Liability Litigation, Southern District of New  
17          York, 2005.

18          Second, Your Honor, the Debtors' position is that  
19          Plaintiffs waived their right to recover on their  
20          administrative expense claims in the adversary context when  
21          they opted-in, affirmatively opted-in, to the administrative  
22          expense claims consent program. But, at the very least,  
23          their participation in that program moots their claim for  
24          relief as to post-petition amounts in connection with this  
25          adversary proceeding.

1           At bottom, Your Honor, Plaintiffs' adversary  
2           proceeding amounts to an end run around the orderly and  
3           efficient procedures that this Court approved to ensure that  
4           all creditors of the estate are treated fairly and  
5           equitably.

6           Now Plaintiffs make a few arguments in their  
7           opposition to the Debtors' motion to adjourn that I would  
8           like to briefly address.

9           First, Plaintiffs claim that this adversary  
10          proceeding is not simply a claim for money damages based on  
11          pre-petition conduct. Plaintiffs argue we've asserted  
12          claims for equitable relief as well.

13          First of all, for reasons that the Debtors would  
14          make clear in a motion to dismiss should it come to that,  
15          Your Honor, Plaintiffs have not and cannot state a claim for  
16          equitable relief here.

17          But even if that were not the case, this Court held  
18          in In Re Johns Manville 1985 that if the claim -- if the  
19          equitable claim is one that can be reduced to a money  
20          judgment, that is -- is effectively a claim for money  
21          damages masquerading as equitable relief, it must be  
22          asserted in connection with the orderly claims process.

23          THE COURT: But that's a -- that's true as a  
24          general proposition but there are two claims in this  
25          complaint that, to me, do seek relief that would be proper

1 as an adversary proceeding.

2 First, the declaration or recognition of an express  
3 trust and, second, the imposition of a constructive trust.  
4 That's not something you would normally litigate, I believe,  
5 in a claim objection.

6 It's affirmative relief that's being sought  
7 separate and apart from a claim. It's basically saying this  
8 isn't property of the estate.

9 MS. CROZIER: Right. So a couple of things on  
10 that, Your Honor.

11 The Debtors are prepared to litigate those claims  
12 for equitable relief in connection with a motion to dismiss  
13 if need be. But we would submit that addressing Plaintiffs'  
14 administrative expense claims -- Plaintiff submitted -- each  
15 Plaintiff submitted one ballot and that ballot covers both  
16 pre and post-petition. Now those ballots include the  
17 amounts Plaintiffs are seeking as equitable relief.

18 And so we would submit that because these are  
19 orderly and -- an orderly and efficient manner of addressing  
20 Plaintiffs' claims that we should adjourn this adversary  
21 proceeding until those claims are resolved and then  
22 determine whether it's appropriate to move forward on those  
23 claims. That's the first argument.

24 The second argument is, again an argument that we  
25 would anticipate making in a motion to dismiss, Plaintiffs'

1 haven't and can't state a claim for breach of express trust.  
2 It's not enough to simply say in -- under the law, it's not  
3 enough to simply say in a contract --

4 THE COURT: But that may be the case.

5 MS. CROZIER: Okay.

6 THE COURT: But why wouldn't the right thing to do  
7 here be to consolidate those two claims under Rule 7042 with  
8 the pending claim objection so it's all dealt with at once  
9 and then set a deadline to answer or otherwise move on just  
10 those two?

11 I mean, the -- I agree with you on the other  
12 claims. They're -- it's just another way of saying we have  
13 a claim as opposed to a separate claim for relief to  
14 establish a trust either actual or constructive.

15 MS. CROZIER: So, just so I understand what Your  
16 Honor is proposing, you would propose to consolidate the  
17 claims for equitable relief with the pending contested  
18 matter?

19 THE COURT: The two -- well, I'm not sure -- I want  
20 to be specific. The claim for express trust and the claim  
21 for a constructive trust.

22 The other claims, the other causes of action, to  
23 me, are already being dealt with in the claims objection  
24 process and properly so. They're not -- they are not the  
25 proper subject of the Rule 7001 adversary proceeding.

1 MS. CROZIER: So I would defer to my colleague in  
2 bankruptcy concerning how to consolidating these claims with  
3 the pending contested matter.

4 THE COURT: Okay.

5 MR. FAIL: Good morning, Your Honor.

6 Garrett Fail of Weil Gotshal & Manges, if I may  
7 address the Court on this issue.

8 THE COURT: Right.

9 MS. FAIL: So the objections that are filed with  
10 respect to the current claims of the administrative and the  
11 pre-petition portions are a part of omnibus objections.

12 The Debtors adjourned that omnibus objection. We  
13 filed the thirteenth omnibus objection to a hundred other  
14 claims with the same issues so that they could all be  
15 addressed. There was a reason that we've consistently, you  
16 know, efficiently moved these cases forward and I'll present  
17 more of an update on the claims later.

18 So I don't think it necessarily makes sense to  
19 combine them.

20 Also Your Honor will recall you set up claims  
21 objections procedures whereby legal issues would be  
22 determined first before factual issues.

23 So, while we agree, and I think Ms. Crozier  
24 suggested and our pleadings suggested, that this be handled  
25 in connection with the claims process and without an

1 adversary proceedings, the additional time delay and cost of  
2 an adversary. I think the objections can be dealt with  
3 separately. They're on track. They'll go forward. That  
4 issue will be resolved.

5 The remaining claims can be dismissed either, in  
6 our opinion, in a motion or in the adversary. It doesn't --  
7 we're just trying to do it efficiently.

8 But I don't think it makes sense to delay or  
9 combine this new equitable relief with the question of  
10 whether they're entitled to a claim.

11 They filed claims and they submitted ballots.  
12 They've asked for a claim. Now they're asking for equitable  
13 relief on top.

14 I think we should address the claim first and  
15 equitable relief afterwards and I think it's an admission  
16 essentially when they filed two claims, they submitted  
17 ballots. They have claims.

18 THE COURT: Well are you saying that they're barred  
19 from asserting a trust?

20 MR. FAIL: We've asked for additional time to  
21 respond. And so if we have -- if they continue to, you  
22 know, prosecute the adversary after -- they might win,  
23 right?

24 We -- the objection is pending. Your Honor hasn't  
25 decided whether or not they have an administrative claim.

1 If they have a claim, this adversary's moot. They  
2 get a hundred cents. They're not going to get additional  
3 monies. They're looking for the same amount.

4 THE COURT: Well it's the other way around, too,  
5 right? If they have a trust, it -- yeah, the claim  
6 objection is moot.

7 MR. FAIL: Sure. But one's already been pending  
8 and subject to -- so it's been responded to and, you know,  
9 it --

10 THE COURT: I just don't see why it's that big a  
11 deal to include a motion to dismiss or a motion for judgment  
12 on the pleadings on the two trust claims as part of your  
13 objection to the claim.

14 MR. FAIL: Well, we can add another objection, Your  
15 Honor. We'll just need a little bit more time to do it and  
16 we'll file a separate objection.

17 But the one that's currently pending was with  
18 respect to the same request for the same amounts but in a  
19 different form. So we didn't have that pending when we set  
20 an objection.

21 THE COURT: I understand that. And so it -- I  
22 think the need to extend the time to answer and to schedule  
23 it in coordination with or combine it.

24 UNIDENTIFIED SPEAKER: Your Honor, if I may. I am  
25 here. I'm counsel for --

1 THE COURT: Okay. I want to get the Debtors' view  
2 first under Rule 7042, it makes sense. And I appreciate  
3 that there are a lot of common issues, common to a lot of  
4 claimants, generally.

5 But, just in terms of efficiently dealing with  
6 these particular claims --

7 MR. FAIL: We wouldn't want to delay, Your Honor,  
8 everybody else. I think Your Honor --

9 THE COURT: No.

10 MR. FAIL: -- has asked us to move forward.

11 THE COURT: I agree with you.

12 MR. FAIL: We'll move forward to dismiss these. We  
13 think that they're frivolous at best.

14 THE COURT: Okay. All right. Anything else?

15 MS. CROZIER: So there were just a couple of other  
16 things that I'd like to address, Your Honor.

17 With respect to the opposition to our motion to  
18 adjourn, Plaintiffs' counsel indicated that there's no cause  
19 for delay here because heretofore the settlement process has  
20 been minimal.

21 Counsel for the Debtors have engaged in several  
22 conversations and substantial correspondence with Plaintiffs  
23 in an effort to reach an amicable and expeditious resolution  
24 of their claims and to avoid depleting the pool of resources  
25 available to the estate's other creditors to no avail



1 because here we are. For example, Your Honor, Plaintiffs,  
2 on Friday, served us with an improper 30(b)(6) notice of  
3 deposition delineating no fewer than 24 topics; improper, of  
4 course, because the parties haven't met and conferred yet  
5 pursuant to Rule 26(f).

6 Second, Plaintiffs filed, last night at 12:27 a.m.  
7 I think, a motion to set aside \$885,000, a reserve from the  
8 second distribution, claiming that the Debtors' negotiations  
9 thus far have been "our way or the highway" and if what  
10 Plaintiffs' counsel means by that is that Debtors have  
11 expressed an unwillingness to pay Plaintiffs any more than  
12 they are owed under the law and any more than the orderly  
13 procedures established by this Court or approved by this  
14 Court for the settlement of their claims, then I suppose, in  
15 that case, Plaintiff is correct.

16 But we do submit, Your Honor, that at least with  
17 respect to the claims that are without question not properly  
18 brought in connection with an adversary proceeding  
19 (indiscernible) adjourn this and give the Debtors  
20 substantially more time to respond.

21 THE COURT: Okay. I'm confused though. I -- my  
22 order confirming the plan contemplated a report and I  
23 believe a motion or an opportunity to object at least if  
24 there was going to be any distribution, right?

25 MR. FAIL: No, Your Honor, I don't believe that

1 there was. I think last time, you may remember, pleadings  
2 were filed because we announced that we were making a  
3 distribution and then the rest ensued.

4 But I don't believe that there is a -- we don't  
5 need to make another motion. I think that there are minimum  
6 conditions that need to be satisfied.

7 THE COURT: Right. I don't think that's right. I  
8 think there's some notice requirement.

9 MR. FAIL: Sure. Notice. But not a -- no hearing.

10 THE COURT: No, a notice requirement.

11 MR. FAIL: Yeah.

12 THE COURT: And people can object.

13 MR. FAIL: Yeah. We'll file a notices in advance.

14 THE COURT: So is this -- was this pleading filed  
15 last night in response to a notice?

16 MR. FAIL: Not at all, Your Honor.

17 THE COURT: So why are we wasting time on this?  
18 It's a total waste of time. Disregard that pleading. It  
19 should be withdrawn. Okay.

20 MS. CROZIER: That's all I have, Your Honor. Thank  
21 you.

22 THE COURT: All right.

23 MS. PAYMER: May I, Your Honor?

24 THE COURT: Yes.

25 MS. PAYMER: Your Honor, my name is

1 Selen Mazer Paymer (ph). I'm here on behalf of Vir Ventures  
2 and AMI Ventures.

3 Your Honor, we did, in fact, file a motion last  
4 night.

5 Our concern is, Your Honor, that we're not being  
6 given the opportunity to be heard and to have this Court  
7 determine the merits of our claims objection, our response  
8 to the second omnibus claims objection as well as our  
9 adversary proceeding, Your Honor. I --

10 THE COURT: But motion is to set aside money?

11 MS. PAYMER: It is, Your Honor. We're  
12 concerned --

13 THE COURT: Well -- but what's the -- why? What  
14 the context?

15 MS. PAYMER: We're concerned, Your Honor. We feel  
16 as though that the Debtors have not complied with the  
17 procedures set forth in the confirmation order with respect  
18 to the administrative claims program --

19 THE COURT: Are they making distributions?

20 MS. PAYMER: Your Honor, they did make an initial  
21 distribution. And --

22 THE COURT: After a notice was given, right?

23 MS. PAYMER: After a notice was given, Your Honor.

24 THE COURT: And the order requires notice to be  
25 given with respect to future distributions.

1 MS. PAYMER: That's correct, Your Honor.

2 THE COURT: And then someone can respond and say,  
3 no, this is premature, right?

4 So why are we creating additional litigation before  
5 that process happens?

6 MS. PAYMER: Your Honor, my concern in conjunction  
7 with their motion to continue the adversary proceeding is  
8 that they're -- the Debtors are trying to run out the clock  
9 on my clients' claims and we're now missing the first  
10 distribution and the second distribution, Your Honor.

11 With respect to the first one, I know the  
12 confirmation order says that there should be an expedited  
13 reconciliation process.

14 And my clients are frustrated here because we've  
15 been trying to resolve this matter on an amicable basis for  
16 months, many months, Your Honor.

17 And we believe that, particularly with respect to  
18 the adversary proceeding, Your Honor, that it's not just an  
19 administrative claims issue. There are also taxes that were  
20 not paid.

21 There may be other individuals involved that we can  
22 name in this litigation that --

23 THE COURT: Wait, wait. Let's just stop.

24 MS. PAYMER: -- would be responsible.

25 THE COURT: Let's stop for a moment. Let's go

1 through this complaint and talk about the Bankruptcy Rules  
2 and the Bankruptcy Code and what can and cannot be brought;  
3 all right?

4 MS. PAYMER: Yes, Your Honor.

5 THE COURT: As I understand it, you have a pre-  
6 petition claim that's been objected to. That pre-petition  
7 claim asserts an administrative expense right under Section  
8 503(b)(9), correct?

9 MS. PAYMER: Correct, Your Honor.

10 THE COURT: And that's the subject of an -- a long  
11 pending objection.

12 MS. PAYMER: Correct, Your Honor.

13 THE COURT: You also have an administrative  
14 expense.

15 MS. PAYMER: Yes, Your Honor.

16 THE COURT: You assert those same claims in this  
17 adversary proceeding. In fact, you incorporate your  
18 pleadings into the adversary proceeding.

19 MS. PAYMER: Yes, Your Honor.

20 THE COURT: Where on Earth is that based on Rule  
21 7001 as opposed to the claims process?

22 Are we supposed to decide these things three times?

23 MS. PAYMER: No, Your Honor. We're just asking for  
24 one --

25 THE COURT: All right.

1 MS. PAYMER: -- (indiscernible) objection.

2 THE COURT: So that is -- that should just be  
3 dismissed. It's not proper in this context as an adversary  
4 proceeding. It's bankruptcy 101. It is not proper to keep  
5 litigating separate -- the same matter in separate  
6 pleadings. It's a waste of time and money.

7 Congress got it right in the Bankruptcy Rules.  
8 It's not covered in Rule 7001. That is not a proceeding to  
9 recover money. It's a claim against the Debtor. It's  
10 already be asserted.

11 Then you say there may be third parties involved  
12 through alter ego or piercing. And is that somehow a claim?  
13 Are you asserting that in this adversary proceeding? You're  
14 not, right?

15 MS. PAYMER: Not against the Debtors' estate, Your  
16 Honor. Against other individuals.

17 THE COURT: You're not asserting it in the  
18 adversary proceeding, right, because the -- those  
19 individuals are not named in the complaint.

20 MS. PAYMER: Not yet, Your Honor. We haven't  
21 engaged in discovery for us to figure out who that would  
22 actually be.

23 THE COURT: So that's not part of this adversary  
24 proceeding either. So you shouldn't be arguing that to me  
25 today either.

1 In fact, that argues to delay this.

2 There is also a serious issue as to your clients'  
3 standing and/or whether it's barred by prior orders of the  
4 Court.

5 So I would hope you would think very carefully  
6 before pursuing that.

7 Among other things, a general alter ego or veil  
8 piercing argument, it is well established in the Second  
9 Circuit is a violation of a stay if it's brought just willy  
10 nilly without stay relief.

11 MS. PAYMER: Uh-huh.

12 THE COURT: But it's not part of this complaint  
13 anyway.

14 So the only thing, to me, that looks like something  
15 new that might be covered by Bankruptcy Rule 7001 as an  
16 adversary proceeding are the two trust claims.

17 Is there anything else?

18 MS. PAYMER: No, Your Honor. That's correct.

19 THE COURT: So that's asserting an interest  
20 improperly as opposed to a claim generally against the  
21 Debtor.

22 MS. PAYMER: Correct, Your Honor.

23 THE COURT: All right. So if one were to actually  
24 deal with this complaint, one would have to sift through it  
25 and exclude all of this.

1 And why should a debtor be forced to spend the  
2 money to move to dismiss a complaint that, on its face, just  
3 doesn't make any sense procedurally?

4 You're throwing out a procedural gauntlet that  
5 doesn't make any sense except for these two claims.

6 MS. PAYMER: Your Honor, I think -- I can confer  
7 with Debtors' counsel with respect to the claims that we  
8 should -- are outstanding and should remain. I think we can  
9 resolve a motion to dismiss.

10 THE COURT: Okay.

11 MS. PAYMER: I'm just concerned my client is here  
12 today. We just want to know when we can actually have this  
13 Court determine any of these issues, the legal issues or the  
14 factual issues.

15 THE COURT: All right. That's a fair point. But I  
16 think we're going to get to that later in today's calendar  
17 which is the schedule for dealing with administrative  
18 expenses.

19 MS. PAYMER: Thank you, Your Honor.

20 THE COURT: Okay. So it seems to me, subject to  
21 hearing the general report on administrative expenses, that  
22 causes of action one, three, which is unjust enrichment,  
23 implied contract; one being breach of contract -- well,  
24 conversion depends on counts two and four. But to the  
25 extent it depends on some other count besides two and four,



1 it should be dismissed. Those should be dismissed.

2 Two and four which are the trust claims dismissed  
3 without prejudice to the claims process. It's already been  
4 underway and underway for months.

5 Two and four should be consolidated with the claims  
6 process under Bankruptcy Rule 7042 which is specifically  
7 contemplated by the advisory committee commentary to the  
8 2007 Amendments to Rule 3007 which deal with what should be  
9 dealt within a claim objection and what should be dealt  
10 within an adversary proceeding.

11 The rules committee and then through that -- then  
12 Congress recognized that there are times when a claim  
13 objection may also implicate matters that are dealt within  
14 an -- properly and necessarily in an adversary proceeding  
15 which would include the cause of action for the imposition  
16 of a trust.

17 And the rules committee said if a claim objection  
18 is filed separately from a related adversary proceeding, the  
19 court may consolidate the objection with the adversary  
20 proceeding under Rule 7042 and that's what should happen  
21 here.

22 Now as far as what goes first, I -- we should talk  
23 about that as part of the pre-trial. But given how the  
24 complaint is -- has been whittled down today, there  
25 definitely should be an extension of the time to answer or

1 otherwise move.

2 But we should now deal with, you know, when that  
3 should be. So why don't we address that in the context of a  
4 pre-trial conference which I gather pertains not only to  
5 this litigation but the timing of resolving common issues in  
6 a lot of different claim objections.

7 I want to know which counsel for the Debtor wants  
8 to address that?

9 MR. FAIL: Your Honor, Garrett Fail from Weil  
10 Gotshal.

11 It doesn't make sense to give the overall report  
12 right now and see where things are?

13 THE COURT: Okay.

14 MR. FAIL: I think it'll be brief.

15 MS. CROZIER: Thank you, Your Honor.

16 THE COURT: Okay.

17 (Pause)

18 MR. FAIL: Good morning, again, Your Honor.

19 Garrett Fail of Weil Gotshal & Manges, for the  
20 Debtors.

21 Your Honor, following entry of the confirmation  
22 order on October 15th, the Debtors sent notices to  
23 approximately 11,274 parties at 16,614 addresses.

24 Claimants were divided into three categories, as  
25 you'll remember. Opt-in, settled admin claims were those

1 who opted-in to the settlement and settled in time to be  
2 eligible for an initial distribution of \$21 million.

3 Non-opt-out settled admin claims would be those  
4 people who did not opt-in but also did not opt-out plus  
5 parties that did opt-in but whose claims were not reconciled  
6 in time for the initial distribution.

7 The third category were those who opted-out and who  
8 could be addressed and reconciled and paid after the  
9 effective date of the Plan.

10 So addressing the opt-in settled admin claim  
11 category first, Your Honor.

12 The Debtors received 1206 ballots. After  
13 reviewing, they identified and deducted approximately 258  
14 duplicate claims and 120 claims or ballots that would be  
15 addressed and should be addressed in separate processes  
16 including professionals that would be paid out of a carve-  
17 out. Utilities for whom there are separate deposit accounts  
18 to be paid for and taxing authorities.

19 That left 828 ballots to review. The Debtors  
20 reconciled and agreed with 359 of them or 43 percent of them  
21 for a total of \$73.2 million that shared in the \$21 million  
22 and they got 28.7 percent in the first distribution.

23 Ninety-eight percent of the payments to those  
24 people cleared. So it was successful. There are roughly 13  
25 checks out of 308 outstanding that haven't cashed.

1 Moving on to the second category and the work  
2 that's been done subsequent --

3 THE COURT: Can I interrupt you?

4 MR. FAIL: Of course, Your Honor.

5 THE COURT: AMI and Vir were in the opt-in category  
6 but they were not reconciled?

7 MR. FAIL: Correct, Your Honor.

8 THE COURT: Okay.

9 MR. FAIL: So they rolled over and rather than  
10 being capped at 75 percent, their cap goes up and they get  
11 to recover up to 80 percent along with the other parties in  
12 the second and subsequent distributions.

13 THE COURT: Right.

14 MR. FAIL: So, in the second category, where we  
15 currently are, this includes as -- this included the opt-in  
16 ballots that have not been reconciled plus additional  
17 motions and proofs of claim that asserted 503(b)(9) claims  
18 plus motions that are filed on the docket and proofs of  
19 claims that were filed asserting 503(b)(1) claims.

20 The Debtors filed -- and plus it also included the  
21 Debtors' books and records for unpaid, post-petition  
22 503(b)(1). That's the population that we were tasked to  
23 deal with.

24 THE COURT: Unless someone opted-out.

25 MR. FAIL: Correct, Your Honor.

1 THE COURT: Right. Okay.

2 MR. FAIL: The Debtors filed ten omnibus objections  
3 to more than 1400 claims. I think roughly 1407, that had  
4 asserted approximately \$702 million in administrative and  
5 priority claims.

6 Of these, all but approximately 48, which is 48  
7 claims for fewer than 30 creditors, have been resolved. So  
8 we resolved over 96 percent of the claims to which we  
9 objected without a contested hearing which I think is  
10 impressive.

11 In terms of the dollars, we resolved, without a  
12 contested hearing, more than 80 -- 98 percent in amount  
13 subject to the first through tenth objections and we're  
14 working with some of the --

15 THE COURT: I'm sorry. Subject to that what?

16 MR. FAIL: First through tenth omnibus objections.

17 THE COURT: Right. Pursuant to --

18 MR. FAIL: Those are the ones that --

19 THE COURT: -- those.

20 MR. FAIL: Pursuant to those --

21 THE COURT: Right.

22 MR. FAIL: -- that the Court either settled,  
23 entered orders, we settled or we withdrew. But we have  
24 reconciled without a --

25 THE COURT: As part of that process.

1 MR. FAIL: As part of that process.

2 THE COURT: Okay.

3 MR. FAIL: And through the administrative consent  
4 process that ensued subsequently.

5 THE COURT: Okay.

6 MR. FAIL: My point, Your Honor, was only that we  
7 didn't burden the Court extensively with contested matters.

8 And we're working with some of the additional  
9 remaining 48 claims on a consensual basis waiting for, for  
10 example, determination as to whether certain contracts will  
11 be assumed or assigned to Transform.

12 So there's reasons that some -- consensual reasons,  
13 why many of the objections have been carried, rather than to  
14 withdraw and refile.

15 THE COURT: Okay.

16 MR. FAIL: Currently, outstanding, there are  
17 approximately 1,936 in number, approximately \$332 million in  
18 asserted amounts outstanding. Still significant. But, of  
19 these, Your Honor, the debtors have reconciled and can agree  
20 to approximately 992 of them, more than 51 percent, leaving  
21 944 disputed. The debtors filed the eleventh, twelfth, and  
22 thirteenth objections to approximately 278 creditors and/or  
23 ballots. That's approximately 30 percent of the 944.

24 The objection deadlines for these will lapse on  
25 March 3rd and March 10, respectively, so coming up in

1 advance of the next hearing, Your Honor.

2 THE COURT: Which is March 25th, I think.

3 MR. FAIL: I believe. If that's the Monday, I  
4 think we changed it to accommodate Your Honor's court  
5 calendar.

6 THE COURT: Okay.

7 MR. FAIL: I think it was the 27th, and now, it's  
8 the 25th.

9 THE COURT: Well, maybe it's the 23rd. That's the  
10 Monday. It's the 23rd.

11 MR. FAIL: I believe it's the 23rd now, Your  
12 Honor.

13 THE COURT: okay.

14 MR. FAIL: But upcoming and the objection deadline  
15 will occur before then, and we're -- we'll be, you know,  
16 consistent with our normal practice, submitting certificates  
17 of no objection to whittle down and avoid the burden on the  
18 Court and all the parties and interests.

19 So, Your Honor, that -- that leaves us with  
20 approximately 668 disputed. Still significant, but a lot  
21 smaller.

22 THE COURT: And I'm sorry. This is in -- just in  
23 Category 2 or in both categories?

24 MR. FAIL: Category 2, Your Honor.

25 THE COURT: Okay.

1 MR. FAIL: category 3 is not significant, in terms  
2 of number.

3 THE COURT: Okay.

4 MR. FAIL: But also, in terms of our mandate for  
5 what, you know, we were tasked to focus on. So this is what  
6 I'm reporting on, Your Honor.

7 Of the 668, approximately 159 of these are real  
8 estate-related. The reason I say that is because the  
9 debtors are working with Transform to ensure that amounts  
10 for which Transform is responsible are paid by Transform,  
11 including cure amounts, and reconciling additional asserted  
12 amounts for the various landlords. So some of them may have  
13 been paid. Some of them will be paid. That's -- that's 159  
14 of the 168.

15 So, setting those aside for the moment, there's  
16 507 others that are disputed that we're working towards  
17 resolving. The debtors have sent out more than 365  
18 individual emails to these parties. The debtors believe  
19 that, for the remaining -- that for 61 of the remaining  
20 creditors or ballots, they relate to contracts that may have  
21 been assumed or were assumed by Transformed and they,  
22 therefore, no longer have claims against the debtors. There  
23 may be nothing left to do with those, so that may be 61 that  
24 are resolved completed. The debtors are researching  
25 approximately 60 creditors to find ballot contact



1 information for those, leaving 23 that haven't been  
2 contacted with a formal email recently, and those will go  
3 out by the end of the week.

4 The emails that we sent out informed parties that,  
5 if they don't respond, the debtors will be pursuing  
6 objections to the claims, and the debtors will do so where  
7 there's no response or the response does not lead to  
8 information sufficient to reconcile. Obviously, there has  
9 been a lot of work that's gone into this process. The  
10 debtors have been efficient with their use of judicial and  
11 estate resources, and we hope to be able to continue that  
12 efficiency while continuing to make process -- progress,  
13 Your Honor.

14 The goal of the debtors is to reduce the number  
15 and the amount of disputed claims in advance of the next  
16 distribution, in order to reduce the need for reserves and  
17 to maximize the amount that's distributable, ultimately.  
18 While the debtors have reconciled amounts that they owe,  
19 they've also sent demand letters and commenced hundreds of  
20 preference actions. There is likely overlap, and the  
21 debtors reserve all rights to pursue affirmative recoveries.

22 The debtors are still collecting information from  
23 Transform and from creditors, but, given the Court's  
24 direction to expedite claims reconciliation, in large part,  
25 the debtors have not held up reconciling amounts owed, in

1 order to get preferences -- preference recoveries net. To  
2 further streamline the process and expedite and maximize  
3 recoveries, the debtors will continue -- will consider the  
4 concept of a convenience, to make lump-sum, one-time final  
5 payments, rather than multiple de minimus payments, for  
6 small claims that have been allowed, to reduce  
7 administrative costs.

8 Your Honor, that -- that brings us up to date and  
9 to where we are. The next hearing is, as you said, at the  
10 end of March. We expect to go forward with a number of  
11 objections, if -- if we have to. We -- we found that the  
12 adjournments have led, as the numbers indicate -- they speak  
13 for themselves. The adjournments have worked. The debtors  
14 have worked consensually, and we've avoided the time and  
15 expense of contested matters. We're currently scheduled to  
16 go forward, and we will, if we have to, on any remaining  
17 items.

18 THE COURT: Well, I -- I was under the impression,  
19 though, that, in -- in saying that, the debtors believed  
20 that there might well be common issues that would need -- it  
21 would make sense to give the parties who have not settled an  
22 opportunity to be heard on, so that -- well, everyone  
23 believes they're the best lawyer. So, you know, the lawyer  
24 who isn't the best lawyer gets heard first and loses, and  
25 then they're stuck. So when do you contemplate that

1 happening, that type of process?

2 MR. FAIL: They are currently teed -- the two  
3 issues that were raised with common -- with common issues  
4 were the world imports issue. There are only two attorneys  
5 And maybe three -- two or three -- three attorneys with four  
6 claims, out of the many, many that were disputed, that seek  
7 to go forward at a hearing.

8 THE COURT: Okay.

9 MR. FAIL: Based on the first. There's another  
10 round of objections, and there's none -- we filed another  
11 objection. There have been no responses to date. So we'll  
12 see what's required, and we may ask the Court for  
13 flexibility. We may go forward, but that's currently teed  
14 up for March.

15 The second issue was what has been referred to  
16 this morning as the marketplace vendors or otherwise  
17 referred to as drop ship, and we filed, as I mentioned,  
18 another objection to 100 claims of a similar issue. It's  
19 teed up for March, if people want to go forward. We'll be  
20 prepared to do that, too.

21 THE COURT: All right.

22 MR. FAIL: Your Honor, I would just say that, with  
23 respect to disputed matters that go forward before judgment,  
24 the appellate process takes time, and we don't -- we, the  
25 debtors, don't believe that, you know, litigation is going

1 to yield a faster recovery to parties. So I'll say it on  
2 the record again.

3 THE COURT: That may well be the case.

4 MR. FAIL: But it -- we're prepared to go forward.

5 THE COURT: And it may be, based on -- and -- and  
6 that's confirmed by what you have been reporting to me just  
7 now, that the claimants, by and large, believe that, too. I  
8 just want to get a sense of the timing here, and it's either  
9 the next hearing or maybe the one after that, where those  
10 issues might be teed up.

11 MR. FAIL: That's right, Your Honor, because  
12 although we have attempted to get this all done, in advance  
13 of the next hearing, the -- between the objection deadline  
14 and the hearing, parties may want time to enter into  
15 settlement negotiations. So --

16 THE COURT: Right, and I'm not going to stand --  
17 I'm not going to stand in the way of that, because that's  
18 parties controlling their own -- their own destiny.

19 So, moving aside to Vir and AMI, it doesn't appear  
20 to me that their issues are really subsumed by those two  
21 joint issues. It's really a --

22 MR. FAIL: They're not, Your Honor.

23 THE COURT: -- a separate legal theory.

24 MR. FAIL: Other parties can assert it. Their  
25 contracts aren't unique, but no one else has, in part,

1 because I'm sure, as Ms. Crozier will tell you, they're  
2 barred. When you have a contract, you can't have quasi-  
3 contract relief, unless amongst other things, but --

4 THE COURT: Well, I -- but I -- but I -- what I'm  
5 saying is I also -- I don't know whether you have other  
6 parties like Vir and AMI that are really online suppliers  
7 with that type of contractual relationship.

8 MR. FAIL: Hundreds, yeah.

9 THE COURT: You do?

10 MR. FAIL: Yes.

11 THE COURT: But -- but others have not raised  
12 these issues?

13 MR. FAIL: I think there was -- there may be one  
14 or two in the -- in the second omnibus objection that  
15 responded asserting it, in response. I'd have to go back  
16 and look, but in general, there have been no adversary  
17 proceedings commenced to declare that it's not our -- that  
18 it's not property of the debtors' estate. So --

19 THE COURT: Okay. So --

20 MR. FAIL: Your Honor, this is a drop ship issue.  
21 They're -- all the drop ship parties have these -- have the  
22 same contract. They're referred to as marketplace vendors.

23 THE COURT: Right. But is that an issue for Vir  
24 and AMI? I guess it is.

25 MR. FAIL: That's what -- that's what the pending

1 objection is. So they're one of the --

2 THE COURT: All right.

3 MR. FAIL: -- parties.

4 THE COURT: So that is -- that is a common issue?

5 MR. FAIL: The drop ship is, yes.

6 THE COURT: Right. And one would get to that on a  
7 non-motion to dismiss basis earlier than -- if the motion to  
8 dismiss is denied on a -- on a summary judgment.

9 MR. FAIL: That's what's teed up for the omnibus  
10 objection, legal matter only.

11 THE COURT: Right.

12 MR. FAIL: You know, applying the facts that  
13 aren't disputed.

14 THE COURT: All right. So it seems to me that the  
15 -- the deadline to answer should be shorter enough, so that  
16 I could have a hearing on those 2 claims, on the 23rd, the  
17 same time as I could have a hearing on the drop ship issue.  
18 Although, if parties are in discussions -- most parties are  
19 in discussions, I would adjourn that, even if one party  
20 wanted to go ahead, because it just doesn't make sense to  
21 force all the other parties to drop meaningful settlement  
22 discussions, because one party doesn't want to.

23 MR. FAIL: Does that leave time for a motion to  
24 dismiss or whatever we'd be filing, with respect to that  
25 issue?

1 MS. CROZIER: It does.

2 MR. FAIL: Okay.

3 MS. CROZIER: So, with the hearing on March 23rd,  
4 would Your Honor propose a deadline to respond of March 9th?

5 THE COURT: To respond to the motion to dismiss?

6 MS. CROZIER: Correct.

7 THE COURT: Well, so when would you file the  
8 motion to dismiss?

9 No, I -- I think it could be seven. The response  
10 to the motion to dismiss could e seven days before the  
11 hearing.

12 MS. CROZIER: Okay.

13 THE COURT: So that would be the 16th.

14 MS. CROZIER: So the response would be the 16th?

15 THE COURT: Right.

16 MS. CROZIER: So the debtors would file the motion  
17 to dismiss --

18 THE COURT: On the 2nd?

19 MS. CROZIER: On the 2nd.

20 THE COURT: Okay, that makes sense

21 MS. CROZIER: And, to be clear, Your Honor, we  
22 would not be moving to dismiss, with respect to Counts 1 and  
23 3, which are the breach of contracts and unjust enrichment  
24 claims.

25 THE COURT: No, those are already -- those are

1 already at issue, and -- and, as far as the last contract --  
2 I'm sorry -- the last cause of action, that would only be  
3 -- oh, I'm sorry. Let's back up. The conversion cause of  
4 action, which is the next to last. Now, that's only  
5 premised upon the trust counts. Otherwise, it doesn't --  
6 it's not really a claim.

7 MR. FAIL: So it's not incremental. We can -- can  
8 we skip that, for the responses, in other words?

9 THE COURT: Yes. And then the last cause of  
10 action which I -- I ignored, which is Count 6, which is  
11 fraudulent or negligent misrepresentation -- again, that's  
12 subsumed within the claim issues. So the only thing that's  
13 live in the complaint are Counts 2 and 4, and, to the extent  
14 they give a predicate to the next-to-last-count conversion,  
15 but it's really 2 and 4.

16 MS. CROZIER: Understood. We can certainly do  
17 that, Your Honor.

18 THE COURT: Okay, all right. So motion to dismiss  
19 or answer on those counts by the 2nd. If it's a motion to  
20 dismiss, the time to respond is the 16th, and then, unless I  
21 adjourn it, the hearing would be on the -- at the same time  
22 as the hearing on the drop box issue on the 23rd.

23 MR. FAIL: Thank you, Your Honor.

24 THE COURT: Although, again, everyone should  
25 understand that, if, you know, a number of parties who had



1 reserved the right to argue the drop box issue on the 23rd  
2 have said, no, we're in discussions, we don't want to do  
3 that, I'm not going to shortchange those -- or short-circuit  
4 those discussions by having one party go ahead.

5 MR. FAIL: Understood, Your Honor.

6 THE COURT: On the 23rd.

7 MR. FAIL: Appreciate that.

8 Unless Your Honor has any other questions, that  
9 concludes the debtors' report on the claims process.

10 THE COURT: Okay, all right. I think that  
11 concludes the pretrial also.

12 MS. CROZIER: Thank you so much, Your Honor.

13 THE COURT: Okay.

14 MS. CROZIER: And I have another proceeding to  
15 attend, if I may?

16 THE COURT: That's fine.

17 MS. CROZIER: Thank you.

18 THE COURT: All right.

19 If you want to memorialize this in a pretrial  
20 order, you can. The record's pretty clear, so I'm not sure  
21 you need to.

22 MR. FAIL: I think -- I think we'll rely on the  
23 record, Your Honor.

24 THE COURT: Okay, okay.

25 MR. FAIL: One other things, on the claims

1 process. The administrative -- the -- the representative of  
2 the -- of the creditors -- that process is still ongoing.  
3 My understanding is that the parties are conducting  
4 interviews and hope to have a person nominated or appointed  
5 within the first week of March.

6 THE COURT: Okay. In the meantime, all this is  
7 going on, and no one seems to be --

8 MR. FAIL: We're making progress, Your Honor.

9 THE COURT: All right, fine.

10 MR. FAIL: We've been working with the Creditors'  
11 Committee and the -- the Debtors' Restructuring Committee  
12 advisers to -- on each of the steps along the way.

13 THE COURT: Okay.

14 MR. FAIL: Okay.

15 THE COURT: When you say the Creditors' Committee,  
16 does that include the committee of the admin. parties under  
17 this?

18 MR. FAIL: Yes, Your Honor.

19 THE COURT: Okay.

20 MR. FAIL: But separately. So the Unsecured  
21 Creditors Committee both parties --

22 THE COURT: Both -- both groups? Okay.

23 MR. FAIL: We're in lockstep, Your Honor.

24 THE COURT: Okay, fine.

25 MR. LABOV: Good morning, Your Honor. Paul Labov,

1       Foley & Lardner, on behalf of the priority claim consortium.  
2       We've been working with the debtors, with respect to the  
3       admin. claim representative.

4               THE COURT: Right.

5               MR. LABOV: Over 380 -- you heard all the numbers  
6       this morning. I won't go through them all. Over 380 some-  
7       odd emails went out to the initial distribution list, in  
8       order to come up with names for that list.

9               THE COURT: Okay.

10              MR. LABOV: Got about a dozen or so. They've been  
11       whittled down and getting everybody onboard, and March 3rd,  
12       I believe, would be the interviews for that process.

13              THE COURT: But, in the meantime, as to the  
14       process for negotiating claims and resolving them, your --  
15       your group's been involved, as well as the unsecured  
16       committee?

17              MR. LABOV: That's correct, Your Honor. We've  
18       been getting emails and daily briefings. Or not daily, but  
19       weekly briefings from Mr. Fail on these issues, including  
20       some of the -- the legal issues that he just discussed.

21              THE COURT: Okay, okay, thanks.

22              MR. FAIL: Your Honor, we can go through the next  
23       two items on the agenda, I think, hopefully, briefly.

24              THE COURT: Okay.

25              MR. FAIL: Item 3 is the debtors' first omnibus

1 objection to claims. Your Honor, we carried this objection  
2 for some time now, and we're moving forward today with  
3 respect to six claims, for which no response was received,  
4 no formal objection was filed, and there's no objection  
5 p[ending]. We gave time for parties to consider due  
6 diligence and respond to us and come back to us, and there  
7 is no objection. So, unless there's any --

8 THE COURT: Okay, that's -- that's Nalco Company  
9 (ph), International Packaging Supplies, and Sherwin Williams  
10 Paint?

11 MR. FAIL: That's right, Your Honor.

12 THE COURT: Okay, all right.

13 Is anyone here on behalf of any of those  
14 claimants?

15 Okay, I will grant the omnibus objection, as to  
16 those claims. Nalco has four. International Packaging has  
17 one, and Sherwin Williams has one. The omnibus objection  
18 shifted any presumption underlying the proofs of claim back  
19 on to the claimant, and the claimant's obviously, have not  
20 carried their burden, in that they haven't responded. That  
21 the reason for the proposed disallowance is clear. It was  
22 either satisfied or released in connection with the  
23 assumption and assignment to Transform.

24 So you can email that order to chambers.

25 MR. FAIL: Thanks, Your Honor.

1 Item 4 on the agenda is now uncontested. It's a  
2 motion of the debtors requesting a release of the adequate  
3 assurance deposit amounts, pursuant to the adequate  
4 assurance procedures. So Your Honor will recall, we entered  
5 an order as like first day, second-day relief, setting up  
6 deposits. The debtors have worked tirelessly with Transform  
7 and outside third-party vendors to terminate utility  
8 accounts for locations that have been rejected.

9 The result is that substantial amounts of money  
10 can be released. No party in interest has objected to this  
11 relief. Notice was provided to all of the affected utility  
12 providers.

13 THE COURT: Okay. How -- that's fine, and -- and  
14 you can submit that order.

15 MR. FAIL: Thank you.

16 THE COURT: But I do have a question. How does  
17 this tie into the adjourned matter, which is the motion of  
18 certain utility companies to determine adequate assurance?  
19 Is that a separate -- I mean, is that truly a separate  
20 thing, or is that sort of wrapped up as part of this?

21 MR. FAIL: Your Honor, that was, I think, pending,  
22 since maybe day two of the case.

23 THE COURT: Right.

24 MR. FAIL: That's on there to keep -- I don't know  
25 why that continues there.

1 THE COURT: Okay.

2 MR. FAIL: But -- but, you know, there --

3 THE COURT: There's a separate one --

4 MR. FAIL: I'm not going to speak for that  
5 attorney and for those clients. Those -- those matters have  
6 largely probably -- that's probably outdated, but the  
7 clients want to continue to have it outstanding.

8 THE COURT: All right.

9 MR. FAIL: So we're --

10 THE COURT: All right. I mean, if -- are they the  
11 same folks --

12 MR. FAIL: -- continuing --

13 THE COURT: -- that have not contested the release  
14 of adequate assurance, that I just granted?

15 MR. FAIL: Related -- related people, with respect  
16 to certain accounts.

17 THE COURT: All right.

18 MR. FAIL: There are a lot of accounts with a lot  
19 of the same parties.

20 THE COURT: All right. Well, I guess, as long as  
21 they keep adjourning it, that's fine, but it doesn't -- you  
22 know, you might ask them to --

23 MR. FAIL: Taking my colleague --

24 THE COURT: Once the order is entered on the --

25 MR. FAIL: It's final, with respect to these --

1 oh, I understand. The language that we put in -- in -- we  
2 added some -- we're going to add some language to the order,  
3 with respect to one of the parties, Your Honor, to make sure  
4 that we're saving money in the account for -- for -- for  
5 that party.

6 THE COURT: Okay.

7 MR. FAIL: So there was one.

8 THE COURT: All right.

9 MR. FAIL: And then there's -- there's other  
10 motions that continue to be carried from month to month to  
11 month to month.

12 THE COURT: Okay.

13 MR. FAIL: If you have any specific questions, my  
14 colleague, Angeline Hwang, can -- can -- can explain.

15 THE COURT: No, that's okay.

16 MR. FAIL: I don't -- okay.

17 THE COURT: I just -- there's clearly not an easy  
18 answer to it. So that's all I wanted, at this point.

19 It just seemed to me the two motions were  
20 inconsistent with each other, and since I've granted the one  
21 --

22 MR. FAIL: There are many, many other accounts  
23 that are still -- for which we're still reserving --

24 THE COURT: Still working on?

25 MR. FAIL: Yeah.

1 THE COURT: Utility --

2 MR. FAIL: It takes time to, apparently, get them  
3 closed --

4 THE COURT: Get the deposits back.

5 MR. FAIL: -- or transferred.

6 THE COURT: Okay, all right.

7 MR. FAIL: Thank you, Your Honor.

8 So the next item is a contested one, and I'll turn  
9 it over to the movant's counsel.

10 THE COURT: Okay.

11 MR. FAIL: Thank you, Your Honor.

12 MS. COLON: Good morning, Your Honor. Sonia Colon  
13 and Gustavo Chico, on behalf of Santa Rosa Mall, LLC, and we  
14 also have Carlos Rios, appearing by Court Call, on behalf of  
15 Santa Rosa.

16 THE COURT: Okay, good morning.

17 MS. COLON: The crux of the matter is that an  
18 indemnity clause included in a settlement agreement between  
19 the debtors and the underwriters, which was not subject to  
20 the procedural requirements of Bankruptcy Rule 1919, is not  
21 enforceable and shall not be used as a justification to  
22 expand the automatic stay to non-debtors' third parties,  
23 thus depriving a claimant of estate rights to file an action  
24 against the underwriters and not the debtors for the loss  
25 suffered on the insured property in 2017.



1 THE COURT: Well, could I -- I've read the  
2 parties' pleadings on this, and I just have some basic  
3 questions that I want to go through first. I understand  
4 that the confidential settlement and release agreement,  
5 which is no longer confidential, --

6 MS. COLON: Correct.

7 THE COURT: -- has 2 provisions in it that  
8 arguably could give rise to claims against the debtors,  
9 paragraphs 5 and 6. Essentially, the debtors settled with  
10 the underwriters for a total payment in respect of the  
11 hurricane Irma and Hurricane Maria claims under the policies  
12 and that obviously, the underwriters did not want to pay  
13 twice, and so, the debtors agreed to indemnify them to hold  
14 harmless and indemnify and defend, the releasees, which are  
15 the underwriters, from any and all actions, demands, and  
16 claims under the policies, which releasor or any mortgagee,  
17 co-owner, or co-insured, additional insured, and/or loss  
18 payee, assignee, or subrogee, releasor, or any other person,  
19 including, but not limited to, owners and/or landlords or  
20 any of releasor's properties may assert at a later date  
21 arising out of the matters herein released.

22 And I know -- I know that Santa Rosa contends  
23 that, that the agreement as a whole, is of no force or  
24 effect, because it wasn't approved by the Court, and  
25 secondly, that that isn't the case, that the provisions on

1 which the debtor is pointing to as the potential harm to the  
2 debtor of lifting the stay or declaring that the stay  
3 doesn't apply, can be severed, but I have a, I guess, a more  
4 fundamental issue, set of questions. The stay was lifted  
5 already in this case, consensually, to let Santa Rosa  
6 proceed against the broker, correct?

7 MS. COLON: Aon.

8 THE COURT: Aon? But not as to the underwriters  
9 or the debtor, and there's a -- there's a history to this.  
10 There's clearly been a number of motions, as well as an  
11 adversary proceeding filed by Santa Rosa, seeking one form  
12 of relief or another, either lifting the stay, declaring the  
13 stay not in effect, declaring the insurance proceeds not  
14 property of the debtors' estate, et cetera, that have been  
15 withdrawn without prejudice, but I have a history from that,  
16 and my understanding, from that history, I just want to lay  
17 out here and see if there's any disagreement with it. The  
18 insurance -- I'm sorry. Let's back up.

19 The lease has a contractual requirement that Santa  
20 Rosa be listed in the applicable policy as an insured,  
21 arguably. That's what you contend.

22 The debtors say, no, that just simply any  
23 insurance proceeds recovered be issued jointly to the  
24 debtors, but in any event, that's 6.03(b)(3), and -- of the  
25 lease, but that's a contractual provision between the

1 debtors -- or the debtor -- and Santa Rosa Mall or its  
2 predecessors, right?

3 And then, however, the policies themselves don't  
4 name insured, right? And they don't -- nor do they name  
5 Santa Rosa as a loss payee. I'm talking about the policies  
6 themselves now. Is that -- that's correct?

7 MS. COLON: Your Honor, when you turn to the  
8 policy as such, there is language therein that it is  
9 covered, and I'm going to go to Docket 63172, and this is  
10 page 4. And may I read from this section? It says, "The  
11 Sears Holding Corporations or any subsidiary --" it don't  
12 sound (ph) -- "organization, partnership, joint venture,  
13 joint lease, or joint operating agreement is now and herein  
14 after constituted or acquire as a respect interest may  
15 appear and any other party for which the insured has the  
16 responsibility for providing insurances as the respective  
17 interest may appear." That's the named insured. With us is  
18 Carlos Rios, who's the expert on insurers and insuring, but  
19 the -- as a result of that language, --

20 THE COURT: So how do their interests appear? How  
21 do Santa Rosa's interests appear, under that language?

22 MR. RIOS: May I address the Court, Your Honor?

23 THE COURT: It's in the policy --

24 MS. COLON: Your Honor, may Carlos Rios address  
25 this issue?

1 THE COURT: Sure, yeah, that's fine.

2 MR. RIOS: Yes, yes, my name is Carlos Rios, and  
3 I'm sorry I -- I was not able to arrive in time to be at the  
4 hearing, and, Your Honor, the issue here is rather simple,  
5 even though it might look complicated. The policies  
6 themselves names as additional insured any person that Sears  
7 was obligated to insure. The contract between Sears and  
8 Santa Rosa provided that Sears had to insure the property.  
9 Furthermore, in order that the -- it agreed -- it obligated  
10 Sears to provide Santa Rosa with certificates of property  
11 insurance, on a yearly basis, and accordingly, Aon was  
12 authorized, pursuant to the insurance policy itself, to  
13 issue those certificates, and every year, Aon would issue a  
14 certificate stating that Santa Rosa and others were loss  
15 payees under the policy. So really, the insurance policy  
16 itself has the authority granted to Aon, who acted as a  
17 broker for Sears, but also as an agent for the underwriters  
18 evidences that Santa Rosa was a named insured or loss payee  
19 under the policy.

20 THE COURT: But the -- the -- the contract, the  
21 lease doesn't provide for Santa Rosa to be a named insured,  
22 correct? It just provides that the --

23 MR. RIOS: Well, --

24 THE COURT: -- the insurance proceeds be paid over  
25 to Santa Rosa.

1 MR. RIOS: That is true. The latter part is true.

2 THE COURT: Okay.

3 MR. RIOS: And --

4 THE COURT: So, as their interests may appear to  
5 me -- I'm going through this, because I have always  
6 understood, having heard this before in prior hearings and  
7 looked at the policies and the lease agreement, that it may  
8 well be that Santa Rosa has a cause of action against Aon,  
9 because of the certificates, but I'm having a hard time  
10 seeing how it has a cause of action against the  
11 underwriters, and this is relevant, because in weighing the  
12 balance under the case law, whether it's Queenie v. Nygard  
13 or Sonnax, the harm to the parties is important. And if  
14 litigation is going to be initiated in Puerto Rico against  
15 the underwriters that, to me, has very little chance of  
16 succeeding, but that the Debtors would have to defend, that  
17 obviously weighs in favor of the Debtors' position.

18 I have another question. And this is an area that  
19 was hardly briefed at all. The motion refers to 26 LPRA  
20 Section 2003(1), which states, "Any individual sustaining  
21 damages and losses shall have at his option a direct action  
22 against the insurer under the terms and limitations of the  
23 policy, which action he may exercise against the insurer  
24 only, or against the insurer and the insured jointly."

25 Now, the case cited Marina Aguila v. Den Caribbean

1 Inc., 490 F. Supp. 2d 240, 245 (DPR 2007), merely refers to  
2 that section. It doesn't construe it or apply it. And in  
3 neither the motion, or the objection, or the reply is there  
4 any real discussion of how this statute works. But just  
5 looking at its plain language, which refers to a direct  
6 action under the terms and limitations of the policy, and  
7 construing it based on my limited Spanish, because the only  
8 opinions I could find were in Spanish, it isn't, to me, what  
9 I normally think of as a direct action statute, which lets a  
10 third party sue an insurer even if the policy itself doesn't  
11 list them as a named insured or a loss payee. And there are  
12 such statutes, usually in the personal injury realm.

13 It appears to me that this is one where there is a  
14 lawsuit under the terms of the policy. And if the policy  
15 itself doesn't name the plaintiff, Santa Rosa, in any way,  
16 except as we have just gone through, again I'm not sure that  
17 this really helps Santa Rosa's cause. On the other hand, if  
18 it truly is a direct action statute and not under the  
19 policy, then it would seem to me that the indemnity doesn't  
20 apply, because the indemnity is under the policy. So I  
21 don't know if either side has any thoughts on that.

22 I mean, I have no problem, and I don't believe the  
23 Debtors do either, in lifting the stay or saying the stay  
24 doesn't apply as to a true direct action statute where the  
25 insurer is being sued, not under the policy, but under the

1 statute. But this language doesn't really seem to provide  
2 for that, this statutory language. So I don't know if  
3 people have thoughts on that. If they don't, I'd like them  
4 to brief it.

5 MS. COLON: Your Honor, I have to --

6 MR. RIOS: Could I address the Court on that  
7 issue, Your Honor?

8 THE COURT: Yes.

9 MR. RIOS: Quickly.

10 THE COURT: Sure.

11 MR. RIOS: Okay. You're right in the sense that  
12 the -- it's a statute directed to liability issues. But in  
13 this case, if we have based our arguments on what I said  
14 previously, the policy itself has a blanket name insured,  
15 which is described as those persons or those entities that  
16 Sears is obligated to insure. Sears was obligated to insure  
17 Santa Rosa. And accordingly --

18 THE COURT: Does it -- well, how was Sears  
19 obligated to insure Santa Rosa? I see that it was obligated  
20 to pay proceeds of insurance to Santa Rosa, but I don't see  
21 how it was obligated to insure Santa Rosa, for example by  
22 naming it as a loss payee or named insured.

23 MS. COLON: Your Honor, Section 6 --

24 MR. RIOS: Your Honor, the thing here is that the  
25 certificate of insurance --

1 THE COURT: Yeah, but that's a separate issue.  
2 The certificate of insurance is why the stay was lifted as  
3 to Aon. Aon may have -- may -- I'm not saying it did, but  
4 it may have, in issuing those certificates, given rise to a  
5 cause of action that Santa Rosa has, and the stay has been  
6 lifted so that you can go against Aon. I'm focusing on --  
7 I'm not focusing on their certificates, because the  
8 certificates is a separate thing.

9 MS. COLON: Your Honor, I'm going to go and  
10 supplement with Mr. Rios for a second.

11 THE COURT: Okay.

12 MS. COLON: I know there's two issues that I want  
13 to clarify. We're trying to set aside one clause, not the  
14 entire agreement, but one clause, which is Section 6, which  
15 is the one of the indemnity. And later, I want to put, I  
16 think --

17 THE COURT: No, no. I --

18 MS. COLON: Second, the lease had --

19 THE COURT: I'm focusing on what's actually at  
20 issue in the lawsuit you want to bring.

21 MS. COLON: The lease agreement in -- I call your  
22 attention to the lease agreement, Section 6.02. That's  
23 where the insurance obligations come from.

24 THE COURT: And the parties briefed this in motion  
25 number two, I think, which was withdrawn and never decided



1 by me. But at the hearing, I said you're going to have to  
2 show me something more than you showed me then, which was  
3 the lease agreement.

4 MS. COLON: But the lease -- you're asking that  
5 the lease agreement --

6 THE COURT: Right.

7 MS. COLON: -- does not provide for a requirement  
8 to place in insurance, but --

9 THE COURT: No. There's a requirement to place  
10 insurance.

11 MS. COLON: Yes.

12 THE COURT: The issue is whether it is insurance  
13 where Santa Rosa is to be a named insured or a loss payee,  
14 or whether Santa Rosa was content in the lease agreement to  
15 rely on the covenant in 6.03 that Sears would turn over the  
16 proceeds to it.

17 MS. COLON: Well, the lease agreement provides  
18 coverage to the insurance. And then the insurance covers  
19 most --

20 THE COURT: All right. You're not really --

21 MS. COLON: Okay.

22 THE COURT: Does it provide this -- 6.02, does it  
23 provide that in addition to obtaining coverage for the mall,  
24 you know, for the building, that that coverage be jointly in  
25 the names of Sears and Santa Rosa Mall, or that Santa Rosa

1 Mall be named as a loss payee?

2 MS. COLON: Well, there's language regarding here  
3 loss payable clauses to the landlord, but I have to find  
4 that there is language also in this lease agreement in which  
5 the money has to be placed in an account in the name of  
6 Santa Rosa.

7 THE COURT: Yeah. That's 6.03, but that's a  
8 contract. That's not -- that's the contract between Sears,  
9 as tenant, and Santa Rosa, as landlord. It doesn't have  
10 anything to do with the insurance policy being something  
11 that the landlord has an interest in. It's a separate  
12 distinction.

13 And the parties dealt with this in a motion before  
14 me. We had a hearing on it. I prepared on it about six  
15 months ago. And I told you then, you didn't lay out enough  
16 for me to show that this argument held water. I said I can  
17 adjourn this, and you can come up with it, but I didn't  
18 believe there was enough. And instead, the motion was  
19 withdrawn without prejudice. And so here we are again.  
20 It's the same issue and I'm at the same place.

21 MR. RIOS: Your Honor --

22 THE COURT: I don't see, in other words, why A)  
23 there is, in fact, a claim against the underwriters, either  
24 under general law or under this statute. And that weighs  
25 heavily in my mind as to whether I should say that the stay

1 should be lifted when the Debtors have already gotten the  
2 money, and in return for getting the money, have represented  
3 and indemnified the underwriters that this is it. They're  
4 not going to have to pay twice.

5 So I just -- this seems to me to be a litigation  
6 that's going nowhere and, therefore, I don't know why I  
7 should let it go nowhere, because it would just be a waste  
8 of time and money.

9 MR. RIOS: Your Honor, can I address the Court?  
10 I'd like to differ, Your Honor.

11 THE COURT: Okay.

12 MR. RIOS: This is Carlos Rios.

13 Your Honor, the problem that we have here is that  
14 Aon acted as an agent for the underwriters. So what Aon  
15 did, when Aon certified that the Santa Rosa was a loss  
16 payee, Aon was acting on behalf of the underwriter, under  
17 the authority provided under the insurance contract. So  
18 it's definitely a responsibility of the insurance company.

19 And this happens every time there is a mortgagee  
20 or a lessor. If they're left out, the insurance company  
21 pays to the debtor or to the insured, in this case Sears,  
22 without the knowledge of the lessor or the mortgagor, this  
23 is what happens. They have to pay twice.

24 Furthermore, Your Honor, we sustain that Sears, if  
25 at one time had a leasehold -- an insurable interest in the

1 property, it has no insurable interest now, because it  
2 rejected the lease.

3 THE COURT: But it's gotten the money. I believe  
4 it's been paid the money, right? So it doesn't really  
5 matter whether it has an insurable interest today. It had  
6 one when the hurricane happened, and it's gotten the money.

7 But can I do back to the first point? I really  
8 didn't understand that the claim that you want to bring  
9 against the underwriters is somehow that Aon was acting as  
10 their agent in giving a false certificate to Santa Rosa. It  
11 seemed to me the claim that you wanted to bring against the  
12 underwriters is that Santa Rosa is entitled to the  
13 insurance, separate and apart from what Aon represented in  
14 the certificate. That the policies themselves are what give  
15 rise to the claim against the underwriters. And that's  
16 consistent with the reference, I believe, to 26 LPRA  
17 2003(1).

18 It's a -- I think what you want to -- I clearly  
19 took away from these pleadings that you want to sue the  
20 underwriters separately and independent from Aon, and not  
21 based on the certificate, but based on their having an  
22 obligation of their own under the policies to pay Santa  
23 Rosa, or not to pay the Debtor. And I just -- I'm having a  
24 hard time seeing that. Their contract is their policy.

25 MR. RIOS: Your Honor, I'm basing my arguments on

1 the insurance contract. Exactly, on the insurance company,  
2 the fact that Aon might not have had authority to issue  
3 those certificates is a different issue. They did issue and  
4 they are barred to deny that the issue -- that the  
5 certificates have no viability.

6 So we -- that's why we asked to sue Aon, but we  
7 never waived our right to sue the underwriters.

8 THE COURT: I know you haven't waived the right,  
9 but I don't see that you have the right. To me, it seems  
10 like a strike suit, and it will bring in primarily -- the  
11 effect will be on the Debtor because of the cost, because  
12 you are suing under the policies.

13 If you were suing on some other basis than under  
14 the policies, then I don't think the indemnification  
15 applies. But if you're suing under the policies, which I  
16 don't think you have a claim for, then the indemnification  
17 applies.

18 MR. RIOS: Your Honor, I have another argument  
19 with regards to the indemnification. It has to -- the  
20 argument was presented in our brief and is based on the fact  
21 that no one should be able to benefit or profit from its own  
22 wrongdoing. When Sears represented in the settlement that  
23 no party had an interest in the insurance proceeds, they  
24 misrepresented that fact.

25 THE COURT: Well, I don't agree with that.

1 There's no lien granted. So the interest is contractual,  
2 which isn't an interest. It's just a contract. And Santa  
3 Rosa has a claim against Sears for that.

4 MR. RIOS: But we have a claim against the  
5 insurance company based on my previous arguments.

6 THE COURT: But those aren't persuasive to me. My  
7 inclination is to have the parties brief this. Let me back  
8 -- let me go at it a different way. The Debtors contend, I  
9 think correctly, under Queenie v. Nygard, and Sonnax, and  
10 Lomas, and the case law, that paragraphs five and six of the  
11 insurance settlement mean that the stay either applies here  
12 or should be extended.

13 And again, I believe that is correct. But that  
14 requires one to look at those provisions. What did the  
15 Debtors, in fact, indemnify the underwriters for? And  
16 again, it's -- any and all actions, demands, and claims  
17 under the policies.

18 So if you're making a demand in the litigation you  
19 want to bring against the underwriters, under the policies,  
20 this indemnification applies. It equally doesn't apply if  
21 you're bringing a claim or demand against the underwriters  
22 on some other basis, i.e. you're the principal and  
23 responsible, ultimately, for Aon's false certificate. But  
24 as far as the policies are concerned, I don't see it.

25 Now, the parties haven't really briefed this. One

1 party, the Debtor, attached their briefing from the last  
2 time we were here on this issue, and that's about it. I'm  
3 happy to give you a little more time to brief that, but I  
4 just don't see it. I don't see the language that ties up to  
5 give Santa Rosa a claim under the policies, as opposed to in  
6 respect of the certificate -- the insurance certificate.

7 So I'm happy to give you more time to brief that  
8 issue and to explain what I think is the case that the  
9 statute doesn't change that, because you still are bringing  
10 the claim, as far as the statute is concerned, the Puerto  
11 Rican statute, under the policies.

12 And if it's under the policies, right now, as I  
13 said six months ago, I'm in the same position today, I don't  
14 see how there is a claim under the policies. At best,  
15 there's a claim because there was a certificate provided  
16 that wasn't accurate.

17 MR. RIOS: Well, I mean, no one has said that the  
18 certificate is not accurate. No one has said that Aon was  
19 not acting as an agent of the insurer.

20 THE COURT: But in respect to their certificate.

21 MR. RIOS: The certificate has value, Your Honor.  
22 And there's --

23 THE COURT: That's why you have a claim against  
24 Aon. And maybe through Aon against the underwriters, but  
25 not under the policy.

1 MR. RIOS: Look, again, I repeat, Your Honor, no  
2 one has questioned the legality or the validity of those  
3 certificates.

4 THE COURT: Well, I do. It's just not true. It's  
5 not true. It's on its face. I don't think anyone needs to  
6 question. If it were true, we wouldn't be fighting over  
7 this.

8 MR. RIOS: Your Honor, that's why we -- if we have  
9 to brief it, we'll brief it, of course. But two steps. One  
10 step is that the certificates validates the policy or test  
11 that it's obligated to insure anyone (indiscern.).

12 THE COURT: Well, that's what has never been  
13 briefed to me. If you guys have cases that show that, that  
14 a certificate controls and changes the terms of the policy,  
15 then you can brief that. The Debtors briefed it. I read  
16 their case. It does seem to stand for the proposition that  
17 the policy controls and not the certificate. That doesn't  
18 mean that you might not have a cause of action against the  
19 entity that issued the certificate and maybe against their  
20 principal based on the certificate, not on the insurance.

21 And again, the indemnification here is in respect  
22 of the -- under the policies. That's what they settled, not  
23 that they gave a false certificated. They didn't settle  
24 that.

25 MR. RIOS: Your Honor, we're not saying -- we're



1 not in disagreement with what you just said. The policy is  
2 the one that responds. The certificate is just every --

3 THE COURT: Well, so I'm going to adjourn this to  
4 give Santa Rosa Mall the time to brief that issue, i.e.  
5 whether a certificate overrides a policy.

6 MR. RIOS: We're not saying that, Your Honor.  
7 We're not saying that it overrides. We're saying that  
8 everything is -- the existence of the policy and the policy  
9 itself says that it's obligated to insure that entities like  
10 Santa Rosa, and Santa Rosa is the one --

11 THE COURT: Well, you could brief that issue too.  
12 But you could take me through the plain language of the  
13 policy and the lease agreement, and try to show me that  
14 there actually -- that the language that has been quoted to  
15 me from the policy actually creates a right in the  
16 insurance, as opposed to the proceeds of the insurance, in  
17 the insurance itself by Santa Rosa, or of Santa Rosa.

18 MS. MARCUS: Your Honor, Jacqueline Marcus from  
19 Weil Gotshal on behalf of the Debtors.

20 May I be heard on just a couple of points?

21 THE COURT: Yes. But so, I'm not prepared to  
22 grant this motion until I see that brief. Now, maybe Ms.  
23 Marcus could persuade me that I should never grant the  
24 motion, but I just -- to me, again, it's just -- well, I  
25 quoted Yogi Berra two days in a row. This is déjà vu all

1 over again. We dealt with this six months ago, except you  
2 guys didn't deal with it. I said, you had to show me more,  
3 and this pleading doesn't show me more on this issue. And  
4 it's the gatekeeping issue.

5 Again, if you want to proceed against the  
6 insurers, separate and apart from under the policies, then I  
7 don't think there's a -- that's like the Aon situation. The  
8 stay should be lifted. But I don't think that's what you  
9 want to do. You want to proceed under the policies. That  
10 raises the issue as to whether that's just a non-starter,  
11 which has only the effect of causing the Debtors to pay a  
12 lot of money to yet again brief the issue, which they've  
13 already done.

14 It just doesn't -- it's not worth it to anyone to  
15 do that under the law. It's just not consistent, subject to  
16 your persuading me that you actually have -- would have a  
17 right against them. Then that's a different weighing of the  
18 factors.

19 MS. COLON: It is our position that the insurance,  
20 combined with the --

21 THE COURT: No. I know it's your position. I  
22 understand.

23 MS. COLON: We'll brief on that.

24 THE COURT: Okay.

25 MS. COLON: But that goes into that there's --

1 that the settlement agreement was valid as such.

2 THE COURT: Right.

3 MS. COLON: But it did not comply with 9019.

4 Again --

5 THE COURT: But 9019 is a bankruptcy rule.

6 Bankruptcy rules cannot create greater rights than exist  
7 under the Bankruptcy Code. So you have in the Bankruptcy  
8 Code in Section 363 two provisions: one, 363(c) says the  
9 debtor can take actions in the ordinary course without Court  
10 approval; and then secondly in 363(b), a debtor must take an  
11 action out of the ordinary course only with notice and an  
12 opportunity for a hearing.

13 So the issue there is is this agreement out of the  
14 ordinary course. There's a separate issue over on top of  
15 that which is even if I assumed it was out of the ordinary  
16 course, no one has really identified anything with regard to  
17 the agreement as to why it's not a proper exercise of  
18 business judgment. Is the amount wrong? I mean, did they  
19 settle for less than they should have?

20 MS. COLON: Your Honor, the fact is that this is  
21 not whether they settle for the amount or the amount  
22 (indiscernible), I said is that there's a \$46 million  
23 settlement for 40 stores at the same time in a catastrophic  
24 category 5 hurricane, which does not compare to the other  
25 ones in damages.

1 THE COURT: Well --

2 MS. COLON: This is out of the ordinary --

3 THE COURT: No, no, but look, the reason I raised  
4 the first point I did first is in part for what I'm going to  
5 say next.

6 If the amount of the settlement is not the issue,  
7 and I don't believe it is the issue, the amount, the issue  
8 that Santa Rosa has with the settlement is that the money  
9 went to Sears, right, not to Santa Rosa? That goes to the  
10 first thing that we just spent the last ten minutes talking  
11 about is to whether that was improper or not. If it was  
12 improper, then retroactively, I wouldn't approve the  
13 settlement if it turns out to have been out of the ordinary  
14 course.

15 And probably, if there was a way around your  
16 client getting money that it had an absolute right to, then  
17 it wouldn't have been in the ordinary course. But if it's  
18 just a settlement of the dollars coming in under the policy,  
19 and there's no dispute about those dollars, it's just where  
20 it went, then it's a no brainer. Of course I would approve  
21 it retroactively.

22 So it all, to me, comes down to the first issue,  
23 which is again, does Santa Rosa vis-à-vis the insurers have  
24 a separate right to get that money, as opposed to the  
25 Debtors?

1 MS. COLON: And we'll brief. It's our position we  
2 consider it that we did, and that this is different from  
3 previous occasions, because we were going against the funds  
4 of the Debtor. Now, we are going against the underwriters,  
5 as such.

6 THE COURT: But in each case, it's the same money.  
7 It's the same money. Okay. So I think I've heard enough on  
8 this point.

9  
10 MS. MARCUS: Jacqueline Marcus, again, Your Honor.  
11 Weil, Gotshal & Manges on behalf of the Debtors.

12 Just a few very brief points. With respect to  
13 Santa Rosa's argument that the language of the policy that  
14 says, "Any other party for which the insured has  
15 responsibility for providing insurance applies to the  
16 landlord. The Debtors dispute that that's what that  
17 language means. And in fact, Santa Rosa has acknowledged  
18 before the Court, actually almost exactly a year ago, that  
19 Santa Rosa was neither a loss payee or a beneficiary of the  
20 policy.

21 I think that ship as sailed and we shouldn't  
22 revisit that again. With respect to the Puerto Rico  
23 statute, Your Honor, you're exactly right. It does say  
24 under the terms and limits of the policy, and I just wanted  
25 to note for the Court that Section 53 of the policy

1 specifically says that the insurers are only obligated to  
2 pay Sears Holdings Corporation or in accordance with the  
3 direction of Sears Holdings Corporation. And that goes to  
4 the merits of any claim against the insurers under the  
5 policy.

6 THE COURT: All right. So Santa Rosa should  
7 address that paragraph in its brief.

8 MS. MARCUS: And finally, Your Honor, the  
9 certificate of insurance specifically says -- bear with me  
10 one second -- "The insurance afforded by the policies  
11 described herein is subject to all the terms, exclusions,  
12 and conditions of such policies. Such policies, limits  
13 shown may have been reduced through paid claims."

14 Your Honor, I know you've said that you were going  
15 to give Santa Rosa more time to brief the issue. We have  
16 spent so much time and effort on this over the past --

17 THE COURT: I'm not asking you all to brief it.

18 MS. MARCUS: Okay.

19 THE COURT: I'm not asking you all to brief if. I  
20 think that -- I appreciate that it's been frustrating given  
21 that we're now on the sixth time that these issues have been  
22 raised with the Court. At the same time, however, each time  
23 Santa Rosa has withdrawn without prejudice. Ostensibly, I  
24 think because of negotiations. I don't think the last  
25 stipulation limited their right to go against the

1 underwriters, it just said they weren't doing it at the  
2 time.

3 So I'd like to nail this down once and for all.  
4 They never really responded to your case law and  
5 interpretation several months ago.

6 MS. MARCUS: That's correct.

7 THE COURT: I don't -- I'm not sure they would be  
8 able to, but I'd like to give them a chance. And I would  
9 ask them -- I mean, I think the leading case on interpreting  
10 this statute, just based on the annotations, is General  
11 Accident Insurance Company P.R. v. Ramos, 148 DPR 523  
12 (1999). It's in Spanish, however. So I think it says -- at  
13 least this is what the annotation says it says, the same  
14 thing that I believe the statute says, which is it's an  
15 action against the insurer under the terms and limitations  
16 of the policy, not just a regular direct action because  
17 you're the intended beneficiary.

18 If Santa Rosa wants to dispute that, they ought to  
19 give me the English translation of that case and other  
20 cases. But I think I heard from his counsel on the phone  
21 that it doesn't dispute that.

22 So, look I -- again, if you want to sue the  
23 insurers not under the policies, but for giving you a false  
24 certificate, I think the Debtors will see their way to  
25 lifting the stay on that, because I don't think the

1 indemnity applies to that. But if you want to sue them  
2 under the policies, I don't see it at this point. And I  
3 don't see -- I think the settlement agreement, in a way, the  
4 argument that it's out of the ordinary course doesn't matter  
5 because, again, the issue there is not the amount that they  
6 settle for, but the notion that somehow either the money  
7 shouldn't have come to Sears, it should have gone to Santa  
8 Rosa, or alternatively, that it's still owed,  
9 notwithstanding that the insurers have already paid it to  
10 Santa Rosa. And to me, that's just -- it's the same issue.

11 And I don't believe that when you weigh the Sonnax  
12 factors, the Debtors should be put to defending that issue  
13 yet again. On the other hand, if there is a -- their right  
14 against the insurers under the policies, that's a different  
15 set of facts to weigh. Those aren't, as far as I can see,  
16 before me today.

17 So I'll give you until the 13th of March to brief  
18 that issue and I'll adjourn this hearing until the 23rd, but  
19 just to cover that point. And if I conclude that the claim  
20 can be under the policies, then I'll have to reevaluate my  
21 analysis of the applicability of Sonnax and Queenie v.  
22 Nygard to that.

23 MS. MARCUS: Thank you, Your Honor.

24 THE COURT: Debtors don't have to file a reply,  
25 you know, unless they've left something out that's



1 absolutely critical and then you can point it out.

2 MS. MARCUS: Okay. Thank you, Your Honor. That  
3 brings us to the conclusion of our agenda for today.  
4 Doesn't it?

5 THE COURT: There had been an objection to the  
6 settlement procedures, the mediation procedures, but that  
7 was resolved, right?

8 MR. FAIL: It was adjourned, Your Honor. I think  
9 there was an issue with noticing, so I think we adjourned it  
10 to a later date.

11 THE COURT: Okay. Fine. On that score, I would  
12 hope that the mediators, given the -- if there's a claim  
13 that's pretty small, we'd do it telephonically or, you know,  
14 not force people to come to New York if it's like a \$15,000  
15 preference.

16 MR. FAIL: Sure. Your Honor, we -- I'm not as  
17 familiar as you are, but we'll make sure that we can do  
18 that.

19 THE COURT: I think that was the main issue.

20 MR. FAIL: Thank you, Your Honor.

21 THE COURT: Okay.

22 MS. MARCUS: Thank you.

23 (Whereupon, these proceedings were concluded at 11:48  
24 AM)

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C E R T I F I C A T I O N

We, Pamela Skaw, Nicole Yawn, and Jamie Gallagher, certify  
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